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No. 94-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,

Petitioner,

v.

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA AND THE UNITED STATES,

Respondents.

Supplemental Brief Of Respondent White Mountain Apache Tribe In Opposition To Petitioner Weissbrodt's Reply Brief

SUPPLEMENTAL BRIEF

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PETITIONER WEISSBRODT'S DISSIPATION "OF SCARCE JUDICIAL RESOURCES"

A. Reply Brief Seeks to Present for First Time Issues of Law

Respondent White Mountain Apache Tribe, acting in conformity with Court's Rule 15, documented the false and fabricated facts and the distortions of the law presented to the Court by Mr. Weissbrodt's Petition, with particular references to the "Question Presented."[1] Tribe stressed throughout its Response that the trial court's unchallenged findings of facts, which were affirmed on appeal predicated upon the precepts of *res judicata,* constitute a complete barrier to the Petition submitted to the Court by Mr. Weissbrodt.[2] Respondent Tribe attempted with diligence to

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[1] Response In Opposition, pgs. 1-07; 11, *et seq.*

[2] *Ibid.*, pgs. 5, *et seq;* pgs. 23, *et seq.*

comply with the Court's mandate that it should address "any perceived misstatements of fact or law"[3] set forth in Petitioner Weissbrodt's filing with the Court. What Respondent Tribe did not anticipate was that Petitioner Weissbrodt would, in his Reply Brief, contend that the finding "essentially nil" is a question of law necessitating this Supplemental Brief Rule 15.7. In this brief, Respondent Tribe will seek to avoid the needless waste of the Court's . . . scarce judicial resources. . . ."[4]

B. Petitioner Weissbrodt Attempts in Error to Convert a Finding of Fact Into a "Question of Law"

Respondent Tribe condemns as grossly unprofessional Petitioner Weissbrodt's pronouncement that "the central ruling below is clearly one of the law." That "afterthought" in the Petitioner's Reply Brief should not be considered by the Court as held in its *Miree Decision*.[5] When the Petitioner was confronted with principles of *res judicata,* which established beyond question that he cannot sustain his burden of proof respecting the legal services which he performed, or for whom those services were performed, or the amount of the fees due and owing to him,[6] it became expedient for him to undertake another fabrication in his desperate effort to mislead the Court. Petitioner Weissbrodt's attempts to convert an explicit, affirmed finding of fact into a question of law and to petition the Court to hear that false question.

C. Futility of Mr. Weissbrodt's Petition for Writ of Certiorari; It Should Be Denied

Assuming arguendo only that the Weissbrodt Petition has some merit, which is denied, Mr. Weissbrodt's claim

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[3] The Court's decision of *Oklahoma City v. Tuttle,* 471 U.S. 808, 815-816 (1985), is the genesis of Court's Rule 15. In *Oklahoma City,* the Court emphasized that "[o]ur decision to grant certiorari represents *a commitment of scarce judicial resources* . . . ." *See,* "The Supreme Court's New Rules for the 90s" 128 F.R.D. 295, 313-314.

[4] *Oklahoma City v. Tuttle,* 471 U.S. 808, p. 815-816, (1985).

[5] Reply Brief, p. 10; See Response in Opposition, p. 20, *et seq.*.

[6] Response in Opposition, p. 5, *et seq.*, p. 21 *et seq.*

is fatally flawed beyond correction. As established by the record, Petitioner Weissbrodt, while purporting to represent Respondent Tribe, spent thirty (30) do-nothing years.[7] As a consequence the trial court found, and the finding was affirmed on appeal, that Petitioner Weissbrodt did not maintain records (1) "... as to the nature of the work ..." he allegedly performed for Respondent Tribe;[8] and (2) that Petitioner Weissbrodt failed to maintain records as to "... the client for whom the work was done."[9] As a consequence, Petitioner Weissbrodt failed to sustain his burden of proof.[10] Respecting Petitioner Weissbrodt's failure to sustain his burden of proof respecting the work he allegedly performed, the trial court found that:

> ... it is difficult to assess what, if any, work performed by ... [Petitioner Weissbrodt] ... contributed to the final judgment for the Tribe.[11]

The trial court stressed that in all other cases that it reviewed "... the petitioning attorneys made a substantial, quantifiable, and easily identifiable contribution to their client's recovery."[12] Continuing, the trial court found that "[i]n contrast, the services rendered and the results obtained by ... [Petitioner Weissbrodt] ... in this case are insufficiently established to justify using a contingent fee calculation."[13]

Unable to respond to the uncontroverted facts that Petitioner Weissbrodt was found by the trial court to have failed to sustain his burden of proving the work he performed for the Tribe and the fees to which he was entitled, Petitioner Weissbrodt in his Reply Brief can make only

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[7] Response in Opposition, p. 13, *et seq.*

[8] Response in Opposition, p. 5, *et seq.*

[9] *Ibid.*

[10] Response in Opposition, p. 5, *et seq*, 21 *et seq.*

[11] Pet. App. B, p. 24; 30 Fed. 8, 19 (1993).

[12] *Ibid.*

[13] *Ibid.* (Emphasis supplied).

this vacuous answer to the trial court's findings and the Tribe's charges:

> . . . Respondent's insistence . . . that the trial court's decision rested on whether Weissbrodt met his 'burden of proof' is misguided.[14]

It is urged to the Court that should it grant to Mr. Weissbrodt his Petition for a Writ of Certiorari, it would be an act of total futility for the reason that the trial court has already declared that Petitioner Weissbrodt has failed to sustain his burden of proof,[15] as a consequence of which he cannot possibly recover the fees that he is seeking. That would be a prime example of a total waste of the Court's . . . scarce judicial resources."

Respondent Tribe did not anticipate that Petitioner Weissbrodt would wait until he filed his Reply Brief to present for the first time to the Court that the "essentially nil *per se* rule,"—which he seeks to have reviewed—is an issue of law.

Attempting to avoid the consequences of his failure to sustain his burden of proving the work that he did or for whom, Mr. Weissbrodt for the first time makes these references to the fact that he desires the Court to consider that the central issue that he seeks to have reviewed is:

> . . . whether the trial court applied the proper standard [as to Petitioner Weissbrodt's burden of proof] in doing so is a question of law. And the only question of law presented in the Petition is whether the lower courts were correct in enunciating a rule that assigned a value of 'essentially nil' to a rejected settlement proposal. . . .[16]

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[14] Reply Brief, p. 9.

[15] *Supra.*, p. 3.

[16] Reply Brief, p. 9; Response in Opposition, p. 19, *et seq.* "Failure of Petitioner Weissbrodt to Sustain His Burden of Proof"; p. 21, "Findings that Petitioner Weissbrodt Failed to Sustain His Burden Controlling Here."

D. The Trial Court's Findings Affirmed on Appeal Are Not Issues of Law

Failure of Petitioner Weissbrodt to consider the trial court's findings, which were affirmed on appeal, has resulted in Petitioner Weissbrodt stripping from context the words "essentially nil" from the balance of the finding and to declare it an issue of law. This is the precise language that was used, which was totally ignored by Petitioner Weissbrodt, both in his petition for certiorari and in his Reply Brief:

> A rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by . . . [Petitioner] for the Tribe was essentially nil.[17]

Irrespective of the fact that the quoted language is explicit, Petitioner Weissbrodt continues to strip from the finding the term "essentially nil" and has attempted to pervert that phase of the finding into a question of law, an approach by Petitioner Weissbrodt that was never previously advanced in his petition for certiorari.

Petitioner Weissbrodt was fully cognizant from the finding of the trial court that his rejected settlement had to be considered on the background of what, if any, benefits accrued to Respondent Tribe from the rejected settlement as it pertained to Respondent Tribe's final judgment. Predicated upon the record before it, the trial court found as an explicit fact that "[t]he result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil." Continuing, the trial court then declared that Petitioner Weissbrodt is ". . . entitled to compensation only to the extent that their [his] efforts contributed to achieving this award"[18]—the Tribe's final judgment.

Respondent Tribe reiterates its repeated assertions that the Findings of Fact and Conclusions of Law reviewed in

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[17] Response in Opposition, p. 11, *et seq.*

[18] Pet. App. B, p. 13a, 30 Fed.Cl. 8, 14 (1993).

its Brief in Opposition are conclusive in all respects and the precepts of *res judicata* preclude Petitioner Weissbrodt from attempting to relitigate them.[19]

It is plain and serious error for Petitioner Weissbrodt to assert that the "burden of proof" that was ". . . imposed on Weissbrodt" was attributed to the trial court's alleged error in finding that ". . . the result obtained by . . . [Petitioner Weissbrodt] . . . for the Tribe was essentially nil."[20] That last-quoted finding has absolutely no relationship to the trial court's other findings that the data submitted to the trial court by Petitioner Weissbrodt for alleged services were grossly inadequate ". . . due to lack of specificity, regarding the nature of the work [that Petitioner Weissbrodt allegedly performed] and the client for whom the work was done."[21] An abundance of unvarying precedents mandate that Petitioner Weissbrodt had the burden of proving the services he rendered, for whom, and the reasonable value of those services.[22] Petitioner Weissbrodt failed to sustain that burden. As stressed above, for the Court to grant certiorari to Petitioner Weissbrodt under the circumstances would be an act of futility.

FAILURE OF PETITIONER WEISSBRODT TO COMPREHEND THE IMMENSE VALUE OF THE TRIAL COURT'S AFFIRMANCE OF TRIBE'S RESERVED *WINTERS* DOCTRINE RIGHTS

Failure of Petitioner Weissbrodt to comprehend the most elemental principles of Western Water Law was a factor in Tribe's decision to terminate his employment. That lack of comprehension is abundantly manifest in the failure of Petitioner Weissbrodt to comprehend the import of the trial court's declaration that the United States Trustee had

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[19] Response in Opposition, p. 19-26.

[20] Reply Brief, p. 9.

[21] Response in Opposition, p. 5, *et seq.*

[22] *Ibid.*, p. 5, *et seq.*, p. 21, *et seq.*

neither taken nor diminished Tribe's reserved Salt River rights irrespective of the repeated contentions of agents of the Trustee that Tribe's reserved rights had been taken and committed to the Secretarial Salt River Federation Reclamation Project.[23]

The sole and only issue before the trial court respecting Tribe's Salt River rights was whether those rights had been taken or diminished by the United States in constructing the downstream Salt River Federal Reclamation Project. At issue before the trial court was the question of whether the United States by inverse condemnation under the Fifth Amendment had taken Tribe's reserved Salt River rights which are interests in real property of the highest dignity.[24] Had there been a Fifth Amendment "taking," the Tribe was entitled to full compensation for the value of its rights. The trial court had the full power, jurisdiction and authority to declare, as it did, that there had not been a Fifth Amendment taking of Tribe's reserved rights or that title to those rights had been subordinated to the rights of the non-Indian Salt River Federal Reclamation Project.[25]

A clear demonstration of Petitioner Weissbrodt's lack of comprehension respecting Tribe's reserved rights to the use of water is his ridiculous statement:

> Thus, the proper forum for the adjudication of Respondent's future water rights was not, and could never have been, any of the tribunals to which this case has been assigned over the decades. They had no jurisdiction. . . .[26]

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[23] Response in Opposition, p. 7-11.

[24] *Wiel, Water Rights in the Western States*, 3rd Ed. Vol. 1, Sec. 18, p. 20-21; Sec. 283, p. 298-300. *See, United States v. Dickenson*, 331 U.S. 745-748 (1947); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Ashwander v. TVA*, 297 U.S. 288, 330 1936).

[25] Response in Opposition, p. 7-9.

[26] Reply Brief, p. 5.

To suggest—as does Petitioner Weissbrodt—that the McCarran Amendment[27] is relevant to the proceedings before the trial court[28] is a further demonstration of his lack of elemental knowledge on the subject. Petitioner Weissbrodt failed to comprehend the import and meaning of the trial court's decision that Respondent Tribe's reserved *Winters* Doctrine Salt River rights have ". . . priority over the rights asserted by the later-created" Secretarial Salt River Federal Reclamation Project.[29]

Petitioner Weissbrodt's Flagrant Misstatements Must Be Controverted

Petitioner Weissbrodt presents these consummate falsehoods in the opening sentences of his Reply Brief: "Respondent does not take issue with the merits of our Petition."[30] Additionally, and contrary to fact, Petitioner Weissbrodt falsely states that Respondent does not rebut the question tendered or challenge the "showing" that a rejected settlement is not a valuable "result obtained." Those statements, grossly contrary to fact, transcend the acceptable precepts of advocacy and because they drastically depart from the truth, they are grossly unprofessional. The Court is requested to reject them.

Respondent Tribe, in its Brief in Opposition, exposed the fraud in Petitioner Weissbrodt's "Question Presented" and established beyond controversy that the Question Presented and Petitioner Weissbrodt's interpretation of the question were never presented to the courts below. That charge is reiterated here with documentation.[31]

Petitioner Weissbrodt, in his Reply Brief, seeking to establish that the "Question Presented" was considered below, sets forth this quotation from his brief in the Court

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[27] 43 U.S.C. 666.

[28] Response in Opposition, p. 7-9.

[29] Response in Opposition, p. 8-9.

[30] Reply Brief, p. 1.

[31] Response in Opposition, p. 19, *et seq.*

of Appeals: " 'The lower court erred in treating the value of the proposed settlement as nil because the Tribe elected to reject it.' "[32] It is manifest from that quoted excerpt from the brief on appeal that Petitioner Weissbrodt, both here and on appeal, perverted the language of the trial court's finding which is as follows:

> The rejected settlement . . . cannot reasonably be termed a 'result accomplished' that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys [Petitioner Weissbrodt] for the Tribe was essentially nil.[33]

The Court is urged to compare the language of the trial court's last-quoted finding with the "Question Presented" here by Petitioner Weissbrodt, and likewise compare that finding with the quotation set forth above taken from Petitioner Weissbrodt's Brief in the Court of Appeals.

It is abundantly manifest that the "Question Presented" here by Petitioner Weissbrodt is drastically different from the quotation in Petitioner Weissbrodt's Reply Brief taken from his brief in the Court of Appeals.[34] It is likewise abundantly manifest that neither Petitioner Weissbrodt's statement to the Court of Appeals nor his question presented to the Court even remotely relate to the trial court's finding.

Petitioner Weissbrodt's attempted perversion of the trial court's finding is an effort to create a question of law and thus mislead the court should result in the denial of his petition for a writ of certiorari.

CONCLUSION

In presenting this Supplemental Brief, Respondent White Mountain Apache Tribe seeks to be of service to the Court by demonstrating that Petitioner Weissbrodt could never

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[32] Reply Brief, p. 10.

[33] Pet. App. B, p. 13a.

[34] Reply Brief, p. 10.

obtain recovery against the Tribe over and above the award that was made to him by the trial court. That fact appertains due to Petitioner Weissbrodt's failure to challenge the trial court's findings that he did not offer proof as to the services he allegedly rendered to Respondent Tribe or indeed offer proof as to the client for whom the alleged services were performed. Under those circumstances, as emphasized throughout this Supplemental Brief, Petitioner Weissbrodt is not entitled to invoke this Court's jurisdiction to review the falsified question that he has presented.

WHEREFORE, RESPONDENT TRIBE renews its request for relief as set forth in its Brief in Opposition.

Respectfully submitted,

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